No. 14-18-00760-CR
In the
Court of Appeals
For the
Fourteenth District of Texas
At Houston

No. 1552218
In the 177th District Court
Of Harris County, Texas

RAUL BAHENA
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S APPELLATE BRIEF

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ORAL ARGUMENT NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

The State believes that the briefs in this case adequately address the matters raised by the Appellant. Therefore, the State does not request oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. § 38.2 (a)(1)(A), a complete list of the names of all interested parties is provided below.

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Terry Gaiser — Defense counsel at trial
Josh Schaffer — Defense counsel on appeal

Trial Judge:

Honorable Leslie Brock Yates — Judge Presiding at trial

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

On Aug. 16, 2017, Appellant was indicted for the felony offense of aggravated robbery by use or exhibition of a deadly weapon, which occurred on May 20, 2017. (C.R. 22). On Aug. 23, 2018, a petit jury found Appellant guilty of the offense as charged in the indictment, and the trial court assessed Appellant's punishment at 25 years in the Institutional Division of the Texas Department of Criminal Justice. (C.R. 113-114). On the same date, Appellant gave his notice of appeal, and the trial court certified the same. (C.R. 117; 119).

STATEMENT OF FACTS

In the evening hours of May 20, 2017, Appellant robbed M. Soria, the complainant in this case, with a gun. (R.R. III 08-09). Soria had just gotten off working the night shift at a Subway, where she was an assistant manager. (R.R. III 09). A friend from school, Dominique, picked Soria up and they went to a local park. (R.R. III 11). Soria had roughly 15 minutes before she was due home for curfew, and spent it with Dominique in a car at the park. (R.R. III 11; 15). The area was "[p]retty well-lit." (R.R. III 15).

After being at the park for approximately two to three minutes, Appellant "showed up." (R.R. III 16). Soria was familiar with Appellant as they went to the same middle school, and Soria was friends with Appellant's cousin. *Id.* Appellant approached the car. (R.R. III 18). Dominique's car's window was down, and Appellant asked for a cigarette. *Id.* After Soria and Dominique told Appellant that they did not have a cigarette, Appellant walked away. *Id.* Appellant returned 30 seconds later and displayed a gun. (R.R. III 22).

Appellant told Soria and Dominique, "this is a stick up…[g]ive me everything you have." *Id.* Appellant was holding a "black handgun," which Soria was certain was a gun. *Id.* Soria was scared that Appellant was going to kill her. (R.R. III 37). Dominique tried to calm Appellant down, but Appellant demanded what they had in the car. (R.R. III 23). Appellant then specifically demanded Soria's purse. *Id.* Soria, not having her purse at the time, gave Appellant her backpack, and Dominique gave

Appellant his hat. (R.R. III 24). Appellant was waiving the gun around, and cocked it several times. (R.R. 24; 26). At one point, Soria began to believe that, while the gun was a firearm, it was not loaded. (R.R. III 25-26).

Eventually, even though Appellant continued to demand more property, Dominique was able to start the car and sped off. (R.R. III 26-27). Soria's backpack and much of Soria's property that was inside were eventually found by police in a backyard of a house inside the neighborhood in which Appellant lives. (R.R. IV 07). Soria eventually got some of her property back, but was still missing some items. (R.R. III 37). Soria was able to identify Appellant as the person who committed the robbery, and was also able to identify Appellant from a photo array. (R.R. III 35-36).

SUMMARY OF THE ARGUMENT

There was sufficient evidence in the record, particularly Soria's testimony, to support Appellant's conviction from aggravated robbery. There was no evidence that the robbery was completed *without* a firearm or deadly weapon and so Appellant was not entitled to an instruction on the lesser-included offense of simple robbery. Finally, the trial court did not abuse its discretion in admitting the jail calls of Appellant; Sgt. Franks was a proper qualified witness that established the jail calls as business records.

REPLY TO APPELLANT'S FIRST POINT OF ERROR

In his first point of error, Appellant contends that he evidence was insufficient to support his conviction for aggravated robbery. (Appellant's Brief – 14). Specifically, Appellant contends that the evidence was insufficient to show that Appellant used a firearm to rob Soria. *Id.* In doing so, Appellant attempts to re-litigate issues of credibility and fact that have already been resolved by the jury. Using the proper legal sufficiency standard, however, shows that the evidence was sufficient to support Appellant's conviction for aggravated robbery.

A. Applicable law and standard of review

In reviewing the legal sufficiency of the evidence, a court is to view all evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In doing so, the reviewing court is "required to defer to the jury's credibility and weight determinations" as the jury is the "*sole* judge of the witnesses' credibility and the weight to be given their testimony." *Brooks*, 323 S.W.3d at 899 (emphasis in original). Evidence is insufficient only when: "(1) the record contains no evidence, or merely a 'modicum' of evidence, probative of an element of the offense; or (2) the evidence conclusively establishes a reasonable doubt." *Kiffe v. State*, 361 S.W.3d 104 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). Also, if the "acts alleged do not constitute the criminal offense charged," the evidence is insufficient. *Id.*

When reviewing the evidence, both direct and circumstantial evidence, as well as the reasonable inferences that are drawn from them, are given equal weight. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Circumstantial evidence alone may be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 09, 13 (Tex. Crim. App. 2007). When conducting a sufficiency examination, a reviewing court may not act as a thirteenth juror by reevaluating the weight and credibility of the record evidence and substitute its judgment for that of the factfinder. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999). It is the jury's job to reconcile conflicts in the evidence, and the jury is free to believe all, some, or none of a witness' testimony. *Murphy v. State*, 95 S.W.3d 317, 321-22 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). In performing a sufficiency review, a court is to "resolve any inconsistencies in the evidence in favor of the verdict." *Rodriguez v. State*, 521 S.W.3d 822, 827 (Tex. Crim. App. 2017).

As relevant here, the State was required to prove that Appellant "use[d] or exhibit[ed] a deadly weapon." TEX. PENAL CODE § 29.03(a)(2). A deadly weapon is "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury," or, "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 01.07(a)(17). A firearm is, therefore, a *per se* deadly weapon. *Id.* The State is not required to show that a firearm was operable or even loaded. *Thomas v. State*, 36 S.W.3d 709, 711 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

B. <u>There was sufficient evidence to show Appellant used a firearm</u>

Soria's testimony alone was sufficient to establish that Appellant used or exhibited a firearm. Soria clearly and succinctly stated that Appellant returned to the car in which she was sitting and, "[t]his time he *he had a gun* and he came up to the car and said *this is a stick up*. Give me everything you have." (R.R. III 22). Soria described the firearm as "a black handgun." *Id.* Soria "knew it was a gun," because she "could see it." *Id.* Soria was able to view Appellant "waiving [the firearm] around" for "maybe three minutes." (R.R. III 24). Soria saw Appellant twice "cock" the firearm. (R.R. III 25-26). Appellant even stated over a jail call that he had "pointed a firearm" at his cousin, which tends to show that he was in possession of a firearm. (St. Ex. 19). These facts all demonstrate that Appellant used or exhibited a firearm during the robbery. Although Soria testified that she believed the firearm was not loaded, the State was not required to prove that the firearm was loaded. *See*, *Thomas*, 36 S.W.3d at 711; *See also*, *Grant v. State*, 33 S.W.3d 875, 881 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd)(holding unloaded firearm was sufficiently a deadly weapon, and observing, "[t]here is no requirement that the firearm be loaded").

Appellant, however, contends that other evidence "overwhelmingly outweighs" the State's evidence that Appellant used a firearm. (Appellant's Brief – 15). Appellant misapplies the proper sufficiency standard, and attempts to impermissibly re-litigate issues of credibility. At the outset, Appellant incorrectly relies on *Wicker v. State*, for the

"overwhelmingly outweighs" language.[1] (Appellant's Brief – 14). *Wicker* specifically disavows an "overwhelmingly outweighs" standard, and states, "[t]he issue on appeal is *not* whether we as a court believe the prosecution's evidence *or* believe that the defense evidence 'outweighs' the State's evidence." *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). Regardless, even if *Wicker* did endorse a view of sufficiency that allowed appellate courts to make factual evaluations and weigh credibility, that would no longer be the standard; the Court of Criminal Appels has completely eliminated that sort of factual sufficiency review as a viable standard. *See*, *Brooks*, 323 S.W.3d at 911-912. Using the proper standard, there was sufficient evidence to support the jury's verdict of guilt for aggravated assault. Appellant's first point of error should be overruled.

C. <u>The evidence was sufficient to show that Appellant was the robber</u>

Although the purported issue of sufficiency that Appellant raises is that "the State failed to show…that [Appellant] robbed Soria with a firearm," Appellant spends a not insignificant amount of his first point of error contending that his brother, Victor, was the actual robber. Out of an abundance of caution, the State will briefly address this issue.

Soria unequivocally identified Appellant as the person who robbed her. (R.R. III 17). Soria was able to view her robber over the course of a at least three minutes. (R.R.

[1] Specifically, Appellant states "the issue on appeal is not whether the appellate court believes the State's evidence but instead believes the Appellant's evidence outweighs the State's evidence." (Appellant's Brief – 14).

III 24). Soria knew Appellant previously. (R.R. III 16). Soria had attended middle school with Appellant, and was friends with Appellant's cousin. *Id.* When presented with both Appellant and his brother, Soria affirmatively and unequivocally identified Appellant as the robber. (R.R. III 44-45). Soria specifically stated that Victor Bahena was not the person who robbed her. *Id.* Appellant tried to evade capture after the robbery by hiding from officers behind a shed and a K-9 unit had to find Appellant, indicating his guilty mind. (R.R. III 71-72). Further, for seven months, as documented in his jail calls, Appellant tried to get friends or family to bribe Soria so that she would either recant or not cooperate with prosecution. (St. Ex. 19). Appellant knew that Soria's testimony would establish that he was the person who robbed her, so he had to try to stop her from testifying. The evidence establishes that Appellant, not his brother, robbed Soria.

Despite this, and like his contention regarding his use of a firearm, Appellant invites this court to re-weigh the evidence and credibility of Soria. (Appellant's Brief – 16-18). In doing so, Appellant rehashes the same arguments that trial counsel made to the jury during closing argument. *Compare* (Appellant's Brief – 16) *with* (R.R. V 13-15). The jury, having heard all of the evidence, and considering Appellant's argument at trial, rejected these points, as evidenced by their verdict. The jury concluded that Appellant, not his brother, robbed Soria with a firearm, and the evidence supports that verdict. Thus, this court should overrule Appellant's first issue.

REPLY TO APPELLANT'S SECOND POINT OF ERROR

In his second point of error, Appellant claims that the trial court erroneously omitted an instruction on the lesser-included offense of robbery. (Appellant's Brief – 19). Appellant does not contend that such error was harmful. Regardless, the trial court properly omitted an instruction on simple robbery. The evidence did not cause simple robbery to become the law applicable to the case as there was no evidence that showed that if Appellant was guilty, he was only guilty of simple robbery.

A. Applicable law and standard of review

A trial judge has a *sua sponte* duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged. *Delgado v. State*, 235 S.W.3d 244, 249-50 (Tex. Crim. App. 2007). A trial judge "does not, however, have an affirmative duty to instruct the jury on all potential defensive issues, lesser included offenses, or evidentiary issues." *Id.* A lesser-included offense does not become the "law applicable to the case" unless the defendant timely requests the issue or objects to its omission from the charge. *Tolbert v. State*, 306 S.W.3d 776, 781 (Tex. Crim. App. 2010). Further, in order for a lesser-included offense to become the law applicable to the case, "first, the lesser included offense must be included within the proof necessary to establish the offense charged, and, second, some evidence must exist in the record that if the defendant is guilty, he is guilty of the lesser offense." *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). Robbery is included within the proof necessary to establish aggravated robbery. *Little v. State*, 659 S.W.2d 425, 425-26 (Tex. Crim. App. 1983).

However, a charge on a lesser is only warranted where there is some "conflicting evidence concerning an element of the greater offense which is not an element of a lesser offense." *Royster v. State*, 622 S.W.2d 422, 444 (Tex. Crim. App. 1981). That is, "[i]f a defendant either presents evidence that he committed no offense or presents no evidence, and there is no evidence otherwise showing he is guilty only of a lesser offense, then a charge on a lesser included offense is not required." *Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994). While the strength or persuasiveness of the evidence that may warrant a lesser-included instruction is not the issue, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider." *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). Some evidence directly germane to the lesser-included offense must affirmatively show that the lesser-included offense is a valid, rational alternative to the charged offense. *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012).

B. The evidence did not raise simple robbery as a valid, rational alternative

Appellant's claim of error solely rests on one argument – that certain portions of Soria's testimony, which Appellant characterizes as contradictory, indicate "Soria believed that Appellant's gun was not even a firearm." (Appellant's Brief – 21). Appellant does not argue that these perceived inconsistencies are actual proof that Appellant did not use or exhibit a firearm, but that they indicate Soria – seemingly

secretly and contrary to her testimony – believed that the item Appellant brandished was not a firearm. *Id.* This is insufficient to act as "affirmative evidence" that establishes simple robbery as a "valid, rational alternative" to aggravated robbery. *See*, *Cavazos*, 382 S.W.3d at 385.

Soria testified that Appellant brandished "a black handgun." (R.R. III 22). Throughout her testimony, Soria maintained that the item Appellant was using was a firearm. *See*, (R.R. III 22-25). Soria testified that she saw Appellant twice "cock" the gun. (R.R. III 25-26). When he robbed Soria, Appellant told her, "this is a stick up." (R.R. III 22). Soria stated that she felt fear because of the gun. (R.R. III 37). Appellant admitted that he "pointed a gun at" his cousin Yessica, indicating his possession of a firearm. (St. Ex. 19). The only evidence in the record pertaining to the robbery shows that the robbery was committed by using or exhibiting a firearm. There is no evidence that Appellant did *not* possess a firearm to effect the robbery, or that the weapon he had in his possession was *not* a firearm. The only way for the jury to have found Appellant not guilty of aggravated robbery, but guilty of simple robbery, would be for the jury to "disbelieve crucial evidence pertaining to the greater offense." *Sweed*, 351 S.W.3d at 68. This is insufficient to make a lesser-included offense the law applicable to the case. *Id.* Appellant was not entitled to an instruction on the lesser-included offense of simple robbery and, as such, the trial court did not commit error in omitting it from the instruction. Appellant's second point of error should be overruled.

REPLY TO APPELLANT'S THIRD POINT OF ERROR

In his third point of error, Appellant claims that the trial court abused its discretion in admitting the testimony of HCSO Sgt. L. Franks, the custodian of record for jail calls at the Harris County Jail. (Appellant's Brief – 22). Primarily, Appellant contends that the trial court abused its discretion in admitting Sgt. Franks' testimony because the State did not include Sgt. Franks on a previously-tendered witness list, and that, as a result, Appellant's trial counsel was surprised by his appearance. (Appellant's Brief – 22-24). Secondarily, Appellant contends that the trial court abused its discretion in admitting Sgt. Franks' testimony as he was not the proper custodian of records. (Appellant's Brief – 24-27). The trial court, however, did not abuse its discretion in admitting Sgt. Franks' testimony, as trial counsel was not actually surprised by his testimony as a legitimate custodian of records for Appellant's jail calls.

A. Applicable law and standard of review

Appellate review of a trial court's ruling on evidentiary issues is done on an abuse of discretion standard. *Fowler v. State*, 544 S.W.3d 844, 849 (Tex. Crim. App. 2018). Reviewing courts must uphold a trial court's ruling on admissibility when that ruling is within the "zone of reasonable disagreement." *Id.* Further, "[a] trial court judge is given *considerable* latitude with regard to evidentiary issues," and "[d]ifferent judges may reach different conclusions in different trials on substantially similar facts without abusing their discretion." *Id.* (internal quotation marks omitted).

Appellate courts review a trial court's decision to admit or exclude witness testimony for this abuse of discretion, including where the State has not included the witness' name on a witness list. *Martinez v. State*, 867 S.W.2d 30, 39 (Tex. Crim. App. 1993); *Hamann v. State*, 428 S.W.3d 221, 227 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). In reviewing a trial court's admission of un-noticed witness testimony for an abuse of discretion, courts consider, (1) "whether the prosecutor's actions constitute bad faith," and (2) "whether the defendant could have reasonably anticipated the witness' testimony." *Wood v. State*, 18 S.W.3d 642, 649-50 (Tex. Crim. App. 2000)(internal quotations omitted). In reviewing whether the State acted in bad faith, "the principal area of inquiry is whether the defense shows that the State intended to deceive the defendant by failing to provide the defense with a witness's name." *Hamann*, 428 S.W.3d at 228 (citing *Nobles v. State*, 843 S.W.2d 503, 515 (Tex. Crim. App. 1992)).

In reviewing whether the defendant could have reasonably anticipated the witness to testify, courts generally review "(1) the degree of surprise to the defendant; (2) the degree of disadvantage inherent in that surprise…and (3) the degree to which the trial court was able to remedy that surprise." *Id.* (citing *Martinez*, 867 S.W.2d at 39); *Noble*, 843 S.W.2d at 515).

Records of regularly conducted activity are admissible if testimony of a "custodian or another qualified witness" shows that, "(A) the record was made at or near the time by-or from information transmitted by-someone with knowledge; (B) the record was made or adopted by the witness when the matter was fresh in the witness'

memory, and; (C) accurately reflects the witness' knowledge, unless the circumstances of the record's preparation cast doubt on its trustworthiness." TEX. R. EVID. 803(6). While a custodian of records is sufficient, 803(6) only requires a person with knowledge of how the record was prepared. *Id.*; *Melendez v. State*, 194 S.W.3d 641, 644 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Rule 803(6) "does not require that the witness be a person who made the record or even be employed by the organization that made or maintained the record." *Melendez*, 194 S.W.3d at 644. A qualified witness need only have personal knowledge of the mode of preparing the records. *See*, *Canseco v. State*, 199 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

B. Sgt. Franks' testimony as a witness did not surprise trial counsel

The trial court did not abuse its discretion in allowing Sgt. Franks to testify as the custodian of records for the jail calls admitted in this case. The record does not support that the State acted in bad faith in omitting Sgt. Franks as a witness from its witness list. Further, the degree of surprise, and any possible disadvantage due to that surprise, in allowing Sgt. Franks to testify was minimal – if any. Regardless, the trial court remedied any surprise by allowing for a recess to allow trial counsel to investigate and interview Sgt. Franks.

The record is devoid of any evidence that the State acted in bad faith in omitting Sgt. Franks' name from its witness list. Appellant does not contend that the State acted in bad faith in omitting Sgt. Franks' name from the list. *See*, (Appellant's Brief 22-24). At some point, the State received the jail calls at issue here; there is no indication in the

record that the State did not produce those jail calls to the defense.[2] The State's witness list was filed April 22, 2018, nearly four months before the trial in this case. (C.R. 44). A subpoena application made by the State on July 09, 2018, listed Sgt. Franks as a person to be served with a subpoena for Appellant's trial. (C.R. 276). The inclusion of Sgt. Franks' name on the publicly-viewable subpoena list indicates that the State was not trying to conceal his identity from the defense. The State explained that, while it had originally intended to use a different deputy to authenticate the records, that deputy was not available for trial. (R.R. IV 15). Therefore, the State called Sgt. Franks, not to surprise the defense, but because the original witness was unavailable. *Id.* Further, there is no advantage for the State to gain by purposely concealing Sgt. Franks from the defense: Sgt. Franks is the witness who simply authenticated Appellant's jail calls and nothing more. There is no evidence of bad faith on the part of the State.

Further, trial counsel should have been able to anticipate that a witness would be called to authenticate the jail calls. Trial counsel suffered little – if any – surprise from the admission of Sgt. Franks' testimony. There was very little disadvantage from whatever surprise there may be. As stated *supra*, the State included Sgt. Franks as a possible custodian of jail call records on a subpoena list contained in the court's file more than a month before trial. (C.R. 276). Trial counsel would have also known that *a* witness would be called to authenticate the jail calls when the State disclosed them.

[2] Certainly if the jail calls were not previously produced trial counsel would have raised that as an issue. The trial court also commented about its conclusion that, "given the fact that you were aware of the fact there were jail calls going to be admitted into evidence…" a point that trial counsel did not dispute. (R.R. IV 17).

As the trial court remarked, "I don't know how in the world there could be any surprise about this given the fact that we all listened to the tape yesterday, given the fact that you were aware of the fact that there were jail calls going to be admitted into evidence there can be no surprise that the State's calling a custodian of records to admit that evidence."[3] (R.R. IV 17).

Regardless, any surprise was remedied by the trial court. In response to trial counsel's objection, the trial court recessed for 30 minutes and made Sgt. Franks available to trial counsel. (R.R. IV 17-18). After fashioning this remedy trial counsel stated "I think that's a good idea." (R.R. IV 17) Further, after the recess, trial counsel was able to cross-examine Sgt. Franks extensively about the process of making calls in the jail, and the possibility of switching identifiers between inmates. (R.R. IV 27-32). The recess was sufficient to eliminate any surprise caused by the State calling Sgt. Franks. *See*, *Nobles*, 843 S.W.2d at 515 (surprise remedied by recess called by trial court to allow trial counsel to interview witness); *Hamann*, 428 S.W.3d at 228 (recess to allow trial counsel to interview fingerprint expert remedied any surprise by lack of inclusion on witness list).

The trial court's ruling did not fall outside of the zone of reasonable disagreement. The trial court did not abuse its discretion in allowing Sgt. Franks to

[3] There is no reference in the previous volume to a hearing about jail calls. Potentially, the trial court was referring to an off-record hearing regarding the jail calls. The State ultimately admitted redacted versions of the jail calls, which may have resulted from such a hearing. (R.R. IV 24). Ultimately, though, the record is silent as to what the trial court is referring.

establish the admissibility of the jail call records. Appellant's third point of error should be overruled.

C. Sgt. Franks testimony properly authenticated the records

Appellant's contention that the trial court abused its discretion by admitting the jail calls because Sgt. Franks was not the "custodian of records" is without merit. Evidence established that Sgt. Franks was a custodian of records for the jail calls, even if the calls were maintained by an outside entity. Regardless, even if Sgt. Franks was not a "custodian," he was still a person with knowledge of how the records were prepared, and was a proper witness to authenticate the records.

Sgt. Franks testified that he was the supervisor of the Tactical Intelligence Unit with the Harris County Sheriff's Office. (R.R. IV 13). As part of his duties, Sgt. Franks and his staff are charged with "gathering and disseminating phone calls from the inmates into the jail and out of the jail." *Id.* Sgt. Franks identified Deputy P. Galvan, a deputy over which Sgt. Franks has supervision authority and who compiled the jail calls on a disc, as "also a custodian of records," and that it was the normal business practices of the sheriff's office to retain the calls. (R.R. IV 21). Sgt. Franks testified about the manner in which the calls could be accessed by people in the Tactical Intelligence Unit. (R.R. IV 18-20). Although the calls were maintained on a server belonging to a company with whom the sheriff's office contracts, there is nothing in the statute that would prohibit multiple custodians of the same records. *See*, TEX. R. EVID. 803(6). There is nothing in the record or the rule that would prohibit deputies with the sheriff's

office, as well as employees of Securus Systems, from both being custodians of the same records.[4]

Regardless, being a custodian of records is not a necessity under rule 803(6). The predicate for a record of a regularly conducted activity may be laid by either a custodian of records *or* another qualified witness. TEX. R. EVID. 803(6)(D). Sgt. Franks testified about how the calls originated, how they were stored, and how they were processed. (R.R. IV 13-25). Sgt. Franks had enough personal knowledge about the manner in which the calls were processed that trial counsel was able, through cross-examination of Sgt. Franks, develop their theory that the caller was not Appellant, but his brother. (R.R. IV 29-32). Although the jury rejected that argument, the only reason trial counsel was able to develop it was due to Sgt. Franks' ability as a qualified witness. Sgt. Franks' testimony established that he had ample personal knowledge about how the record was prepared, and, thus, he was a proper witness through which the predicate for the records was established. *See*, *Canseco*, 199 S.W.3d at 444. Thus, the trial court did not abuse its discretion in admitting Sgt. Franks' testimony, or in determining that State's Exhibit 19 was properly authenticated by Sgt. Franks. Appellant's second subpoint of error in his second issue should be overruled.

[4] The San Antonio Court of Appeals, in addressing a similar argument, characterized a deputy assigned to a similar unit of the Bexar County Sheriff's Office as a custodian. *Castillo v. State*, No. 04-16-00836-CR, 2018 WL 3635163, at *4 (Tex. App.—San Antonio Aug. 01, 2018, no pet.)(not designated for publication). The jail calls in that case were also kept by a private company, IC Solutions. *Id.* The San Antonio Court of Appeals still characterized the deputy as a custodian, although because of the inadequate briefing by the defendant in that case, it is difficult to get a complete ruling. *Id.*

CONCLUSION

There was sufficient evidence in the record, particularly from Soria's testimony, to establish that Appellant used a firearm in order to accomplish the robbery. Because there was no evidence that Appellant did not use a firearm in the robbery, and because the only way for the jury to convict Appellant of simple robbery was to disbelieve crucial testimony from the State's case, Appellant was not entitled to an instruction on the lesser-included offense of simple robbery. Finally, the trial court did not abuse its discretion in admitting State's Exhibit 19, the jail calls; Sgt. Franks was a proper qualified witness, and he established the predicate for their admission.

PRAYER FOR RELIEF

It is respectfully submitted that all things are regular and the conviction should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that, according to Microsoft Word, the portions of this brief for which TEX. R. APP. P. § 09.4(i)(1) requires a word count contains 5,162 words.

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